IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30/03/2004

Coram

The Honourable Mr. Justice F.M. IBRAHIM KALIFULLA

C.R.P. No.848 of 2000 and C.R.P. 849 OF 2000

Venus Chit Fund and Finance
Corporation, rep. by its
Managing Partner A. Ilango ... Petitioner

-Vs-

1. The Pondichery Co-operative
Housing Society Limited, rep.
by its Secretary, Pondichery

2. P. Thandapani

3. T. Banumathi

4. T. Muthuvel

5. T. Saravanan

6. T. Malathi

7. T. Sivagami

8. D.A. Viswanathan ... Respondents

Petitions under Sec.115 of the Code of Civil Procedure
against the orders of Additional Subordinate Judge of
Pondichery dated 31-3-1998 made in E.A. No.313 of 1991
in E.P. No.34 of 1991 in O.S. No.236 of 1983

!For Petitioner :: Mr. R. Subramanian

^For Respondents :: Mr. V. Karunakaran (R1)
R2 to R7 given-up
N.A. for R8

:ORDER

This is the second round of litigation over the very same

application moved by the first respondent herein in the pending execution petition. The first respondent filed E.A. No.313 of 1991 by way of a claim under Sec.47 of the Code of Civil Procedure (in short CPC) to declare that it is entitled to receive a sum of Rs.67,203.39 with subsequent interest thereon as the first charge-holder over the money lying in E.P. No.537 of 1989 pursuant to an attachment dated 8-2-1991 in E.A. No.106 of 1991 in E.P. No.34 of 1991 at the instance of the petitioner.

2. The brief facts which are required to be stated are that there was a decree in favour of one Shanthi Finance Corporation, who filed E.P. No.537/1985 and brought the house and plot, which was under mortgage with the first respondent herein at the instance of the second respondent herein, for court-auction sale. The sale proceeds were deposited in the Munsif Court at Pondichery and the said Finance Corporation withdrew the amount to the extent of its dues while, the remaining amount was lying in E.P.No.537/1985. The petitioner herein obtained a decree in O.S. No.236 of 1983 as against the second respondent herein for a sum of Rs.45,760/-. Pursuant to the said decree in the said suit, the petitioner filed E.P. No.34 of 1991 and in E.A. No.10 6 of 1991 obtained an order of attachment of the sum remaining in deposit in E.P. No.537 of 1985. It was at that juncture, the first respondent herein came forward with E.A. No.313 of 1991 in the said E.P. No.34 of 1991 in O.S. No.236 of 1983, making the claim as mentioned above. The said execution application was dismissed earlier by the execution court. As against which, a revision in C.R.P. No.2856 of 199 5 was preferred by the first respondent. The said revision came to be disposed of on 1-4-1997 in which a remand came to be made. While remitting the matter back, it was held therein as under:

"Though the petitioner can proceed against the immovable property, since they are secured creditors, but still the auction purchasers has to be put on notice. Where there is any other debt, or not is, not clear from the records. Whether the parties are entitled for rateable distribution or not is a question to be considered. Since the lower court has not taken into consideration these aspects, I am of the opinion that it is better to send back the matter to the lower court, giving an opportunity to all the parties to let in evidence and assert their claim. The lower court is directed to consider the matter afresh, including the question as to whether the petitioner is entitled for rateable distribution or not."

In the said order, it was further held in paragraph 4 as follows:

"When it is admitted that the execution proceedings taken out by the petitioner herein before the concerned authorities to execute the award is pending, it is open to the petitioner also to seek appropriate relief in the said execution petition either to attach or seek for appropriate relief."

3. In the above stated background, when the matter came to be dealt with again by the execution court, the court auction-purchaser was impleaded as a party to the application and he was also served notice. However, it is noted by the execution court that he remained ex parte in the proceedings. The execution court came to the conclusion that the first respondent herein, being a secured creditor, was having priority over the petitioner herein irrespective of the attachment ordered in E.A. No.106 of 1991. So holding, it went on to state that the attachment had to be

withdrawn, leaving the first respondent society to approach the Second Additional District Munsif in E.P. No.537 of 1989 for appropriate reliefs. The execution court has also held that Sec.73 C.P.C. is not applicable to the petitioner as well as the first respondent herein.

4. Mr. R. Subramanian, learned counsel appearing for the petitioner, at the outset, contended that the claim of the first respondent is hit by the first proviso to Sec.73 C.P.C. and, therefore, its remedy for appropriation of whatever money due to it pursuant to the mortgage of the property in question was elsewhere. Sec.73 along with its first proviso reads as under:

"S.73. Proceeds of execution-sale to be rateably distributed among decree-holders.- (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons:

Provided as follows:-

(a) Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share any surplus arising from such sale;

(b) not relevant

... ..."

Considering the first proviso, in the first instance it will have to be held that the property which was sold in E.P. No.537 of 1989 should always be held to be the one subject to the mortgage of it with the first respondent herein. It will have to be further held that, irrespective of the fact whether it was specifically stated in the said manner either in the decree or in the sale proclamation, impliedly, that would be the legal consequence by virtue of the factum of the mortgage of the said property with the first respondent herein. If that be so, the first respondent, as the mortgagee, is not entitled for any rateable distribution in any surplus arising from the sale of such property, which had taken place in E.P. No.537 of 1989. If once that position is clear while applying provisio (a) to Sec.73 C.P.C., as a sequel to it, there was no right in the first respondent herein to claim for any share or seek for the rateable distribution along with the petitioner or any other decree-holder, as the case may be. It, however, does not mean that the first respondent herein is not entitled to proceed against the property once over again by virtue of the present sale, which had taken place in E.P. No.537 of 1989. The first respondent, as the mortgagee, always retains its right to proceed against the property mortgaged with it in realisation of whatever dues that may be payable by virtue of the said mortgage, which had culminated into an award and which is also stated to be pending by way of execution before the concerned execution officer of the Co-operative department. However, such proceedings by virtue of the said mortgage will have no bearing when it comes to the question of the execution of the decree as sought for by the petitioner in the civil court, which is pending as on this date in E.P. No.34 of 1991, in which the order of attachment came to be made in E.A. No.106 of 1991. Certainly, the attachment made in the said E.A. No.106 of 1991 can never be disturbed at the instance of the first respondent merely because it is in the status of the

mortgagee of the property in question which came to be sold in the court-auction in E.P. No.537 of 1989. The first respondent, as rightly contended by the learned counsel for the petitioner, will have to work out its remedy in the manner known to law in the independent proceedings for the realisation of whatever sums due to it pursuant to the said mortgage. Having regard to the said position, I am unable to sustain the conclusion of the execution court in allowing the claim petition and also ordering the raising of the attachment in E.A. No.106 of 1991 on 8-2-1991. The said order, being contrary to proviso (a) to Sec.73 C.P.C., is liable to be set aside. Accordingly C.R.P.No.848 of 2000 stands allowed and the impugned order is hereby set aside.

5. In the light of the order passed in C.R.P. No.848 of 2000, the dismissal of E.P. No.34 of 1991 by the execution court is also liable to be set aside and C.R.P. No.849 of 2000 also stands allowed. E.P. No.34 of 1991 shall be restored to the file of the execution court and the same shall be disposed of on merits. No costs.